In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1011

ARMORED CARRIER CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (260 F. Supp.

612; J.S. App. B) dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission, Division 1 (J.S. App. F; 99 M.C.C. 126). The order (a) granted appellee, B.D.C. Corporation ("B.D.C."), a certificate authorizing operations as a common carrier by motor vehicle of commercial papers, documents, and written instruments used in the conduct of business by banks and banking institutions, between Chicago, Illinois, on the one hand, and, on the other, points in five Wisconsin counties; and (b) dismissed appellant's complaint which alleged that B.D.C. had been providing such service without appropriate authority (J.S. App. A, p. 12; App. F, p. 71).

B.D.C. is a motor common carrier authorized by the Commission to engage in the transportation of cash letters (lists of cancelled checks accompanied by the cancelled checks) for banks and banking institutions, photographic film and supplies, dental and ophthalmological supplies, and business records and memoranda. It holds numerous grants of interstate operating authority from the Commission and intrastate operating authority from various States. In 1957 the Commission granted it authority to transport cash letters between Chicago and points in fifteen Wisconsin counties (J.S. App. A, p. 12; App. F, p. 63). B.D.C. commenced operations to the specified points, but it also began serving points in five Wisconsin counties in its line of haul for which no authority had been granted (J.S. App. A, p. 13, n. 1). In 1961 appellant, Armored Carrier, filed a complaint

with the Commission challenging the unauthorized service. Thereupon, B.D.C. applied for authority to serve these points.

After full administrative proceedings, the Commission dismissed appellant's complaint and granted the application to serve the five Wisconsin counties. Armored Carrier conceded its inability to provide the complete service which shippers supporting B.D.C. require (J.S. App. F, p. 67). The Commission found that the "public need for the service is unquestioned" (J.S. App. F, p. 66); that "a grant of authority [to B.D.C.] would be of no material consequence to Armored Carrier's existing operations" since Armored was not then authorized to provide the service (J.S. App. F, p. 67); and that B.D.C. was financially fit (J.S. App. F, p. 64). It further found that B.D.C. had begun the unauthorized operations inadvertently on the mistaken assumption that it had the requisite authority and through the inexperience of its management (J.S. App. F, p. 63); and that it had promptly sought temporary authority when its unauthorized operations were questioned (J.S. App. F, p. 66). The Commission made no specific findings on the question of whether B.D.C.'s continued unauthorized operations for four and one-half years were willful or inadverent. It concluded, however, that in the circumstances, the evidence as to the past unauthorized operations "does not require a finding of unfitness" (J.S. App. F, p. 68).[1]

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[1] Commissioner Murphy dissented on the ground that the past operations were willfully performed and rendered applicant unfit (J.S. App, F, p. 69).

In appellant's suit challenging this ruling, a three-judge district court, one judge dissenting, sustained the Commission's order (J.S. App. A).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

Whether a motor carrier should be issued a certificate of convenience and necessity depends upon findings by the Commission that it is

> fit, willing, and able properly to perform the service proposed and to conform to the provisions of [the Interstate Commerce Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service * * * is or will be required by the present or future public convenience and necessity. * * * [49 U.S.C. 307(a).]

Appellant does not question B.D.C.'s willingness and ability to perform the service proposed or the public need for that service. Nor does appellant challenge the Commission's findings that B.D.C. is financially fit to conduct the proposed operations, and that it is equipped to meet the exacting requirements of the Chicago Federal Reserve Bank and the other banks that rely upon it (J.S. App. F, pp. 64-66). The principal question raised is whether the Commission's report is defective because, in assessing B.D.C.'s fitness, the Commission failed to make a specific finding as to whether B.D.C.'s operations to the five Wisconsin counties were "willfully continued" without

authority. We think this misconceives the Commission's duty and its findings in this case.

It is well established that past unauthorized operations do not necessarily bar the issuance of a certificate for needed service, since a primary object of the regulatory scheme is to assure that shippers will have a means of meeting their transportation needs. See *United States* v. *Drum*, 368 U.S. 370, 374.[2] Past conduct is of course relevant in "assessing the prospective conduct of the applicant" (J.S. App. A, p. 15). But the critical question which the Commission must resolve is not whether past unauthorized operations were willful, but how those past operations relate to all of the evidence bearing on the ultimate issue of fitness. Whether a subsidiary finding is necessary as to willfulness, therefore, depends upon the significance of that element to the Commission's ultimate determination. The Commission had no need to characterize B.D.C.'s past operations as willful or inadverent because it was not required to make its ultimate determination turn on this fact. Here, the Commission quite explicitly stated: "While we do not condone applicant's past unauthorized operations, we conclude that the evidence as to these operations does not require a finding of unfitness" (J.S. App. F, p. 68).

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[2] *Central Wisconsin Motor Transport* v. *Steel Transportation Co.*, 98 M.C.C. 232, 240; *Paladino Common Carrier Application*, 76 M.C.C. 581, 583; *McLaughlin Common Carrier Application*, 73 M.C.C. 318, 320; *Ratliff & Ratliff, Inc., Extension —Florida*, 73 M.C.C. 181, 184; *Cullum Extension—Ohio*, 67 M.C.C. 5, 10.

The Commission's report reveals that it carefully considered all of the arguments raised by appellant as to the nature and gravity of B.D.C.'s unauthorized operations and "gave adequate consideration to the subsidiary issue of 'willfulness'" (J.S. App. A, p. 19). Furthermore, the Commission reviewed and adopted, with modifications, the examiners' statements of fact (J.S. App. F, p. 62). There is, therefore, no basis for supposing that any factor adverse to B.D.C.'s application escaped the Commission's scrutiny. Moreover, as the report also reveals, the Commission weighed such adverse factors against all the other evidence bearing on the application, including the fact that B.D.C. began unauthorized operations inadvertently, that it initially thought it had authority to carry on the operations, that it was otherwise willing and able to serve the five counties, and that there is a significant need for the service.

Since the essential basis for the Commission's judgment was disclosed in its report, the requirements of the statute are satisfied. See *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216, 228; *United States* v. *Pierce Auto Lines*, 327 U.S. 515. Appellant is in effect asking that the district court be directed to substitute its judgment for the Commission's as to the significance of "willfulness" in the circumstances of this case. But, where the Commission has fully considered the unauthorized operations in reaching its ultimate conclusion, has disclosed the essential basis of that conclusion, and there is substantial evidence in the record to support the Com-

mission's determination (J.S. App. A, p. 21), the court's function is at an end. *United States* v. *Pierce Auto Lines, supra.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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